Filed 12/2/15 In re C.Y. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re C.Y. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.Y., Defendant and Appellant.	E063555 (Super.Ct.Nos. J251309 & J251310 & J251311) OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Jene-Rene Basle, County Counsel and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant, A.Y., the mother of L.Y., R.Y., and C.Y., appeals from orders in the cases of L.Y. and C.Y. terminating reunification services for the mother under Welfare and Institutions Code section 366.22.[1] When plaintiff and respondent, San Bernardino County Children and Family Services (CFS), filed juvenile dependency petitions relating to the three children on September 23, 2013, they were ages 13, 12, and 8, respectively. R.Y.'s case is not a subject of this appeal.[2]

The children were removed from A.Y.'s custody when she was arrested for child endangerment after a search of her home turned up multiple controlled substances. The original dependency petitions for her children were grounded on allegations that: (i) A.Y.'s substance abuse problem interfered with her ability to provide adequate care and supervision for her children and (ii) A.Y. failed to provide a safe home environment for her children due to her use of controlled substances and growing marijuana.[3] During the reunification period, A.Y. made limited progress, but failed to participate in numerous drug tests, failed to complete counseling services, and ultimately tested positive for amphetamine use. At the 18-month review hearing, these facts led the juvenile court to terminate reunification services.

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[1] All further unlabeled statutory references are to the Welfare and Institutions Code.

[2] The juvenile court entered orders terminating reunification services in the cases of all three children. A.Y. filed a notice of appeal related to all three cases. However, the parties' briefs indicate this appeal concerns C.Y. and L.Y., but not R.Y. Accordingly, we discuss R.Y.'s case only to the extent it is factually relevant to the cases of his siblings.

[3] Initially, CFS petitioned for removal based on A.Y.'s incarceration. The court later dismissed those allegations.

On appeal, mother argues the court erred in finding that returning C.Y. and L.Y. to her custody would create a substantial risk of detriment to the children and consequently that the order terminating her reunification services should be reversed. For the reasons discussed *post*, we affirm the judgment.

I

FACTUAL BACKGROUND

On September 5, 2013, R.Y., then 12 years old, was found to be under the influence of marijuana while attending school. R.Y. told a Hesperia school police officer that he "took a 'joint' from his mother's bedroom." The officer drove R.Y. home and spoke to his mother and her cohabitant boyfriend, Z.K. While there, the officer observed marijuana plants growing in the backyard. He reported his findings to the San Bernardino County Sheriff's Department, and based on the report, sheriff's detectives investigated and obtained a warrant to search the home.

Sheriff's detectives served the search warrant on September 19, 2013. During the search, they located numerous mature marijuana plants growing in the backyard. Detectives also located several bags of processed marijuana, approximately one to three grams of methamphetamine, and bottles containing Lyrica, morphine, oxycodone, and several other prescription medications, including medical marijuana.

One detective found R.Y. in his room where he also found two open capsules of Lyrica. Detectives observed that R.Y. "seemed to be very confused and very slow to respond to questions . . . and had trouble concentrating on anything at all." They concluded he was under the influence of a narcotic and called for medical assistance.

R.Y. reported he had taken Vicodin and Norco and said he had gotten them from the hallway. R.Y. was taken to receive treatment at Desert Valley Hospital.

Detective David Mascetti questioned A.Y. about R.Y.'s condition and access to narcotics. She said she had never seen him abusing drugs, but acknowledged he had been brought home from school earlier in the month for being under the influence of marijuana. A.Y. said she once had prescriptions for Lyrica and Vicodin. She said she believed she still had Vicodin pills in her room, but was not sure whether she still had Lyrica pills. She also acknowledged having other medications in her medicine cabinet and in a container in her closet. She said she had not previously kept her medications secure, but put a lock on her door after R.Y. was caught stealing from her room a few weeks earlier. Detective Mascetti noted the door to her room was not locked when he arrived and that A.Y. did not have a key for the lock. A.Y. admitted using marijuana and methamphetamines, though she denied current use of methamphetamines.

CFS arrived at the scene and spoke to Detective Mascetti, A.Y., L.Y. and C.Y. L.Y. reported her brother R.Y. had been caught smoking marijuana in the past and that she had seen him smoke marijuana in his room. She said she did not know where her mother kept her marijuana and denied going into the yard where the marijuana plants were growing. She denied seeing her mother under the influence, but knew her mother smoked marijuana for back pain. C.Y. denied knowing of any drug use in the house. Both children reported they always have enough to eat, clean clothes, and that their mother takes good care of them. CFS was unable to speak with R.Y. because of his condition. CFS determined the children should be removed from the residence, and

placed L.Y. and C.Y. with their maternal grandparents. A.Y. and Z.K. were arrested for child endangerment. (Pen. Code, § 273a, subd. (a).)

On September 23, 2013, CFS filed juvenile dependency petitions on behalf of L.Y. and C.Y. At the detention hearing, the juvenile court ordered the children detained from their mother's custody upon finding a prima facie case that the children fell within section 300, and placed the children with their maternal grandparents. The juvenile court ordered A.Y. to submit to a drug test on the same day.

On November 18, 2013, the juvenile court held a jurisdictional/dispositional hearing. CFS reported that A.Y. had tested positive for marijuana and amphetamine use on September 24, 2013 and had not appeared for requested drug tests on October 10, October 30, and November 8. The parties submitted and the court accepted amended dependency petitions. The amended petitions alleged A.Y. "tested positive for amphetamines and marijuana on September 24, 2013," "has a valid medical marijuana card," and that her drug use "interfered with her ability to provide adequate and appropriate care and supervision" to L.Y. and C.Y. The petition also alleged A.Y. "has failed to provide a safe home environment for the children . . . by growing marijuana which was not properly secured away from the children," conduct which "places the children at serious risk of harm and neglect."

The juvenile court found those allegations to be true, and found the children came within section 300, subdivision (b). The court declared the children dependents, removed them from their mother's custody, and ordered their continued placement with their maternal grandparents. The court approved a reunification services plan and ordered

A.Y. to participate in individual counseling, an outpatient 12-step drug program, and substance abuse testing. The juvenile court initially refused to order parenting classes, but at a later hearing ordered A.Y. to participate in parenting classes as well. The court also ordered A.Y. to submit to a drug test the same day.

At subsequent review hearings, CFS reported on problems A.Y. was having complying with her reunification plan. On May 19, 2014, it reported that A.Y. had nine "no show" drug tests and had failed to attend an intake session for her substance abuse classes. On November 19, 2014, CFS reported that A.Y. had not attended individual counseling sessions, had met with a CFS substance abuse counselor once, but did not attend outpatient drug counseling and did not submit to drug testing.

CFS also reported at each review hearing on A.Y.'s relationship and involvement with her children. In a written report submitted before the May 19, 2014 review hearing, CFS reported A.Y. was having appropriate visits with the children and the children enjoyed the visits. On November 19, 2014, CFS reported that A.Y. had been having successful visits with the children. A.Y. was attending C.Y.'s sports events and L.Y.'s school drama events. It was difficult for the children to separate from A.Y. after visits, and both children reported that they wanted to return to their mother's care. CFS's written report stated a home visit revealed A.Y.'s home to be in appropriate condition and decorated for Halloween.

At each review hearing, the juvenile court found A.Y. had made only minimal or moderate progress on her reunification services plan, and emphasized that she needed to submit to drug testing to regain custody of her children. At each review hearing, the

juvenile court found, by the preponderance of the evidence, that returning the children to the custody of their mother would be detrimental. The court ordered reunification services continued and ordered A.Y. to submit to drug testing at each hearing.

On March 20, 2015, the juvenile court continued the 18-month review hearing to update information on the case plan and to set the matter as contested. CFS reported A.Y. had submitted to a drug test on November 19, 2014. Initially, the test came back positive for amphetamine use, but a confirmation test came back negative. A.Y. reported she had finished her parenting class and attended some individual counseling sessions, with four remaining. The juvenile court gave CFS authority to allow an extended home visit. The juvenile court also ordered further drug testing for A.Y. and that she submit for a drug test the same day. On April 17, 2014, the juvenile court authorized CFS to continue the children on extended visits with A.Y.

On May 5, 2015, CFS filed additional information with the court. CFS reported it had learned A.Y. had not completed her parenting classes and did not complete her individual counseling program. CFS also reported that A.Y. had failed to show for drug testing on several occasions and failed to produce a sample on another occasion. On May 7, 2015, A.Y. tested positive for amphetamine use.

The juvenile court held an 18-month review hearing on May 12, 2015. Based on the new information, the court found, by clear and convincing evidence that A.Y. had failed to participate regularly and make substantive progress in her case plan. The court found, by a preponderance of the evidence, that returning the children to the custody of their mother would be detrimental and terminated reunification services. The court also

found, by clear and convincing evidence, that a compelling reason existed for determining a section 366.26 hearing was not in the best interests of the children, and ordered placement with their maternal grandmother with a specific goal of independent living with identification of a caring adult to serve as a lifelong connection.

II

DISCUSSION

On appeal, A.Y's only claim of error is that the juvenile court's finding that returning the children to A.Y.'s custody would create a substantial risk of detriment to the children was not supported by substantial evidence. We disagree.

"Absent extraordinary circumstances, the 18-month review hearing constitutes a critical juncture at which 'the court must return children to their parents and thereby achieve the goal of family preservation or terminate services and proceed to devising a permanent plan for the children.' [Citation.]" (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 596.)

Section 366.22, subdivision (a), governs 18-month review hearings and provides dependent children shall be returned to the custody of the parent "unless the court finds, by a preponderance of the evidence, that the return . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a); see also *Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704 (*Constance K.*).) It further provides that unless the court determines return is likely within six months, the failure of the parent or legal guardian to participate regularly and

make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.

CFS has the burden of establishing detriment. (§ 366.22, subd. (a); *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1345 (*Jennifer A.*).) The risk of detriment must be substantial, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 788.) In evaluating detriment, the juvenile court must consider the extent to which the parent participated in reunification services (§ 366.22, subd. (a); *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1748) and the efforts or progress the parent made toward eliminating the conditions that led to the children's out-of-home placement. (§ 366.22, subd. (a); *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142 (*Dustin R.*).)

After a section 366.22 ruling, we review a juvenile court's decision for an abuse of discretion. "'Evidence sufficient to support the court's finding "must be 'reasonable in nature, credible, and of solid value; it must actually be "*substantial*" proof of the essentials which the law requires in a particular case.'" [Citation.] "Where, as here, a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citations.]' [Citations.] In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination." (*Constance K., supra,*

61 Cal.App.4th at p. 705.) "[W]e draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947, opn. mod. on den. rehg.).)

Here, substantial evidence shows A.Y. failed to participate in the reunification plan designed to remedy the problems that led CFS to remove the children from her custody. Most important, A.Y. failed almost entirely to comply with the drug testing requirement of her reunification plan. According to the record, she tested only three times over approximately 20 months. Her first test, the day of the dependency hearing, was positive for marijuana and amphetamines. Her second test, after more than a year of failing to test, was negative on a confirmation test. But her third test, nearly six months later, and less than a week before the 18-month review hearing, came back positive for amphetamine use. In the months between those tests, A.Y. either failed to show for her scheduled tests, or showed and failed to produce a sample. "Drug testing is an important component of the reunification plan, and we must consider the missed tests to be positive tests." (*Jennifer A.*, *supra*, 117 Cal.App.4th at p. 1343.) A.Y.'s failure to comply with the drug testing portion of her plan and her failure to address the root cause of the dependency proceedings were almost total.

A.Y. also failed to participate in other elements of her reunification plan. She failed to initiate a drug counseling program the court ordered during the jurisdictional/dispositional hearing. She failed to complete parenting classes. She failed to complete an individual counseling program. Together with the missed and positive

drug tests, these facts provide substantial support for the juvenile court's finding that A.Y. did not make substantive progress in her treatment program and had failed to eliminate the problems leading to the children's removal. (*Dustin R.*, *supra*, 54 Cal.App.4th at pp. 1141-1142.)

A.Y.'s continuing problems with drug use are serious and pose a substantial risk of detriment to the children. A.Y.'s possession and use of drugs in the home was the primary reason CFS commenced dependency proceedings. Her repeated failure to take affirmative steps to address the problem, even after more than 18 months of intervention, fairly demonstrated A.Y. did not intend to cease using drugs and the danger to her children persisted. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.) The juvenile court determined returning L.Y. and C.Y. to her home would put them at the same risk of involvement in drugs that derailed their brother's life and led to the initiation of this case. That determination was supported by substantial evidence, and the court's decision to terminate reunification services was therefore not an abuse of discretion. (*Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619, 623, 625.)

A.Y. argues it was inappropriate for CFS to "focus[] on [R.Y.] in its argument" and that it "could not site [*sic*] to any current evidence supporting [the] position . . . that the current positive test created a risk of harm." There is a sound reason that CFS and the juvenile court have kept R.Y.'s case firmly in mind in considering the placement of his siblings. R.Y.'s case is a cautionary tale. A.Y. exposed R.Y. to drugs and drug use, and failed to supervise him properly. As a result, R.Y. began using several kinds of drugs. Despite this precedent, A.Y. failed to face and address her drug problems and the

resulting exposure of her children to drugs. The juvenile court concluded that placing L.Y. and C.Y. in A.Y.'s custody posed a substantial risk that these children would follow their brother down the same path. We cannot say the juvenile court's finding was not supported by substantial evidence.

A.Y. contends her strong relationship with her children and the fact they want to return home show that returning them to her care would not present a substantial risk. She points out that she visited her children regularly, attended their extracurricular events, and provided support and affection to both children. Because A.Y. did not make substantive progress in her treatment programs, the burden shifted to her to prove returning the children to her care would *not* be detrimental. (*In re Cory M.* (1992) 2 Cal.App.4th 935, 949-950, superseded by statute on another point, as stated in *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1342.) The juvenile court could reasonably conclude A.Y. did not carry this burden. The fact that A.Y. has a positive relationship with her children has not led her to address her drug use. Nor do her strong relationships or the children's desires to return home mitigate the dangers posed by exposing the children to an environment where drugs are prevalent and supervision is lacking. The juvenile court could reasonably conclude the evidence that these dangers persist outweighs the evidence that A.Y. has maintained positive relationships with her children. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 230 ["A judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence"].)

A.Y. contends *Jennifer A., supra,* 117 Cal.App.4th 1322 and *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495 (*Rita L.*) teach that terminating services is not permissible in the face of a few positive drug tests. In fact, the holding of those cases is much narrower and inapplicable to A.Y.'s case. In *Jennifer A.*, the mother lost custody of her small children because she left them alone in a motel room while she went to work and the mother "substantially complied with her reunification plan, . . . completed parenting courses and counseling, . . . completed drug treatment, and knows proper parenting behavior." (*Jennifer A.*, *supra*, at p. 1326.) Though the mother completed about 84 drug-free tests, she tested positive for alcohol and marijuana one time each and missed nine tests, and the court found returning custody to the mother would be detrimental on that basis. (*Id.* at pp. 1327, 1346.) In *Rita L.*, the mother successfully completed a residential drug treatment program, consistently participated in drug testing, and consistently returned clean results. (*Rita L.*, *supra*, at p. 499.) The sole exception occurred after Rita L. accepted a Tylenol containing codeine from her adult daughter to treat a headache. (*Id.* at p. 501.) Rita L. claimed she did not know the pill contained codeine when she took it, but the juvenile court did not believe her, and the resulting positive test led the court to terminate services and schedule a hearing under section 366.26. (*Rita L.*, *supra*, at pp. 502-503.) In both cases, the Court of Appeal held the detriment finding was not supported by substantial evidence. (*Jennifer A.*, *supra*, at p. 1346; *Rita L.*, *supra*, at p. 506.)

None of the factors that led to reversal in *Jennifer A.* and *Rita L.* is at play in this case. A.Y.'s possession and use of narcotics was the primary basis for removal. A.Y.'s

positive and missed drug tests were not isolated incidents against a background of compliance. Finally, unlike the parents in *Jennifer A.* and *Rita L.*, A.Y. did not complete ordered counseling. A.Y. failed to complete drug counseling, individual counseling, and parenting classes, and failed to consistently participate in drug testing. On two of the three occasions when she did test, she tested positive for amphetamines, one of the drugs found at her home and which precipitated the dependency cases. Thus, the juvenile court here had far more evidence to support its detriment finding than the courts in *Jennifer A.* and *Rita L.*

III

DISPOSITION

We affirm the judgment.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.